

lib.

0060B

BEFORE THE POLLUTION CONTROL HEARINGS BOARD  
STATE OF WASHINGTON

BARTELLS MATERIALS MANAGEMENT,  
INC.,

Appellant,

v.

PUGET SOUND AIR POLLUTION CONTROL  
AGENCY,

Respondent.

and

TODD PACIFIC SHIPYARDS  
CORPORATION,

Appellant,

v.

PUGET SOUND AIR POLLUTION CONTROL  
AGENCY,

Respondent.

PCHB NO. 91-162

FINAL FINDINGS OF FACT  
CONCLUSIONS OF LAW,  
AND ORDER

PCHB NO. 91-168

This is an appeal of Notices and Orders of Civil Penalties issued by Puget Sound Air Pollution Control Agency ("PSAPCA") to Bartells Materials Management, Inc., and Todd Pacific Shipyards Corporation for alleged violations of air pollution control regulations concerning asbestos removal and disposal. A formal hearing was held on October 21, 1991 at Lacey, Washington. Board Members Harold S. Zimmerman (presiding) and Annette S. McGee were present.

FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER  
PCHB NOS. 91-162 & 91-168

(1)

1 Appellant Bartells Materials Management, Inc., was represented by  
2 Michael Miller, Project Manager, and appellant Todd Pacific Shipyards  
3 Corporation was represented by Allen Rainsberger, Manager of  
4 Environmental/Occupational Safety and Health for Todd Shipyards  
5 Corporation. Respondent PSAPCA was represented by Attorney Keith D.  
6 McGoffin of McGoffin and McGoffin (Tacoma).

7 The proceedings were recorded by Louise M. Becker of Gene Barker  
8 and Associates.

9 Opening statements were made. Witnesses were sworn and  
10 testified. Exhibits were admitted and examined. From the testimony,  
11 exhibits and arguments of the parties, the Board makes these

#### 12 FINDINGS OF FACT

##### 13 I

14 Bartells Materials Management had submitted a proposal  
15 February 8, 1991, which became a signed contract with Todd Pacific  
16 Shipyard Corporation dated March 4, 1991, to remove V.A.T., Terrazzo  
17 and C.A.B. from the cafeteria building located at Todd's Shipyard,  
18 Seattle for a price of \$43,939.00 including any air monitoring by  
19 Bartells. The 8-part contract covered scope of work, completion,  
20 contract price, changes and extra work, insurance, waste, liability,  
21 and other provisions. The contract proposal stated that all work was  
22 to be done in accordance with all state and federal regulations.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27

II

PSAPCA is an air pollution control authority pursuant to State of Washington Clean Air Act, Chapt. 70.94 RCW. It is responsible for monitoring and enforcing emission standards, for hazardous air pollutants, including work practices for asbestos. PSAPCA has filed with the Board certified copies of its Regulation III (including all amendments thereto).

The Board takes official notice of the Regulation, as amended.

III

Richard J. Gribbon, Air Pollution Control Inspector for Puget Sound Air Pollution Control Agency, made an inspection at approximately 1:30 p.m., March 28, 1991, at Todd Pacific Shipyards, Building T-1, located at 1801-16th Avenue SW, Seattle, King County, Washington, in response to a Notice of Intent to Encapsulate and Remove Asbestos filed with PSAPCA by Bartells Materials Management, Inc.

IV

The Notice of Intent to Remove or Encapsulate Asbestos was filed by Mike Miller, project manager for Bartells Materials Management Inc., on February 26, 1991 with the asbestos abatement project to start March 11, 1991, and to be completed March 25, 1991. It was to remove or encapsulate 11,022 square feet of terrozzo and 2,000 sq. feet of V.A.T., (vinyl asbestos tile) in the old Cafeteria building,

1 also known as the T-1 Building.

2 V

3 Inspector Gribbon and Allen Rainsberger, Todd's  
4 Environmental/Occupational Safety & Health manager, toured the  
5 facilities. In the old Test and Trials Room on the first floor of the  
6 T-1 Building, where a portion of the north wall had been demolished  
7 and vinyl asbestos tile had been removed before demolition, Inspector  
8 Gribbon observed several chunks of dry, suspected concrete asbestos  
9 board (CAB) in the debris pile .

10 VI

11 Inspector Gribbon also observed broken, dry, suspected CAB in the  
12 wall and on top of an electrical panel on the back side of the  
13 partially-demolished wall, and took samples of the suspected CAB. The  
14 electrical panel was located in what had previously been the women's  
15 restroom, and Inspector Gribbon observed friable CAB on the floor and  
16 took samples from the nails left on the walls. The material broke and  
17 pulverized between Inspector Gribbon's fingers.

18 VII

19 The inspector noted that the Notice of Intent did not state that  
20 CAB removal would be included in the Bartell Materials Management  
21 project. Inspector Gribbon advised Mr. Rainsberger and James  
22 Anderson, vice president of Todd Shipyards, that, if the samples  
23 analyzed proved positive for asbestos, Notices of Violation would be  
24

1 issued. Mike Miller of Bartells Materials Management was also  
2 notified by telephone of possible violations, and a meeting was  
3 scheduled with Mr. Miller on the site April 1, 1991.

#### 4 VIII

5 On April 1, 1991, Michael Miller, and Dale Erickson, Bartell  
6 supervisor at the project, Rainsberger of Todd and Inspector Gribbon  
7 met at the T-1 Building. Gribbon showed the Bartell Representatives  
8 broken suspected CAB and advised them that no notifications had been  
9 filed with PSAPCA for CAB removal and that they should file an amended  
10 Notice of Intent to reflect CAB removal.

#### 11 IX

12 On April 2, 1991, Bartells filed an amended Notice of Intent,  
13 adding CAB, that had been previously removed. Samples submitted to  
14 the Department of Ecology Manchester Laboratory for analysis showed  
15 materials from the north wall of the test and trials room and from the  
16 north wall of the former women's restroom contained 55% chrysotile  
17 asbestos.

18 Notices for Violation of Regulation III, Article 4, Sections  
19 4.03(d), 4.04(a)(4)(A-B-C), and 4.04(b) and Section 4.05(a)(1)(B) were  
20 issued to Bartells Materials Management, Inc. and Todd Pacific  
21 Shipyards Corporation on March 28, 1991 and on May 9, 1991, certified  
22 notices were mailed. On June 20, 1991, Notice and Order of Civil  
23

1 Penalty No. 7444 was issued, assessing a fine of \$1,000 and  
2 incorporating all the violations.

3 X

4 The CAB material was approximately 3 square feet.

5 XI

6 Any Conclusion of Law deemed to be a Finding of Fact is hereby  
7 adopted as such.

8 From these Findings of Fact, the Board makes these

9 CONCLUSIONS OF LAW

10 I

11 The Board has jurisdiction over the subject matter and the  
12 parties. Chapt. 43.21B RCW. The case arises under regulations  
13 implementing the Washington Clean Air Act. Chapt. 40.94 RCW.

14 II

15 Asbestos is a substance which has been specifically recognized  
16 for its hazardous properties. It is classified pursuant to Section  
17 112 of the Federal Clean Air Act. It is a substance which by Federal  
18 Clean Air Act definition:

19 *causes, or contributes to, air pollution which may*  
20 *reasonably be anticipated to result in an increase in*  
21 *mortality, or an increase in serious irreversible, or*  
*incapacitating reversible illness.*

22 III

23 The federal asbestos-handling regulations have been adopted by  
24 the Washington State Department of Ecology. WAC 173-400-075(1).  
25

26 FINAL FINDINGS OF FACT,  
27 CONCLUSIONS OF LAW AND ORDER  
PCHB NOS. 91-162 & 91-168

(6)

1 PSAPCA has adopted its own regulations on removal of asbestos,  
2 designed to meet or exceed the requirements of the federal/state  
3 regulations. PSAPCA Regulation III, Article 4.

4 IV

5 The relevant portions of regulations at issue in this case are:

6 Failing to comply with the following sections of Article 4  
7 of Regulation III:

- 8 4.03(d) *Causing or allowing any deviation from*  
9 *the information contained in a written*  
10 *notice without filing an amended notice*  
11 *for approval by the Control Officer.*
- 12 4.04(a)(4)(A) *Failure to keep adequately wet until*  
13 *collected for disposal all*  
14 *asbestos-containing materials that have*  
15 *been removed or may have fallen off*  
16 *components during the course of an*  
17 *asbestos project.*
- 18 4.04(a)(4)(B) *Failure to collect for disposal at the*  
19 *end of each working day all*  
20 *asbestos-containing materials that have*  
21 *been removed or may have fallen off*  
22 *components during the course of an*  
23 *asbestos project.*
- 24 4.04(a)(4)(C) *Failure to contain in a controlled area*  
25 *at all times until transported to a waste*  
26 *disposal site all asbestos-containing*  
27 *materials that have been removed or may*  
*have fallen off components during the*  
*course of an asbestos project.*
- 4.04(b) *Causing or allowing the demolition of any*  
*building, vessel, structure, or portion*  
*thereof, without removing all*  
*asbestos-containing material before any*  
*activity that would disturb the materials*  
*or prevent access to the materials for*  
*removal or disposal.*

1           4.05(a)(1)(B)     *Failure to seal all asbestos-containing*  
2                               *waste materials in leak-tight containers*  
3                               *after wetting to ensure they remain*  
                              *adequately wet when deposited at a waste*  
                              *disposal site.*

4  
5                               V

6           Because asbestos is inherently dangerous, the duty to comply with  
7           asbestos-handling requirements is non-delegable. Thus, we have held  
8           in asbestos cases a party cannot relieve itself of responsibility by  
9           contract. Federal Way School District #210 v. PSAPCA, PCHB No. 86-164  
10          (January 28, 1987); citing, Sea Farms, Inc. v. Foster & Marshall  
11          Realty, 42 Wn. App. 308, 711 P.2d 1049 (1985). We conclude similarly  
12          in this case.

13                               VI

14          We conclude that the Notices and Orders of Civil Penalty in this  
15          case were of sufficient particularity to provide appellants adequate  
16          notice of Regulation III, Article 4 violations. They recited dates  
17          and location of the violations and recited the specific sections  
18          alleged to be violated.

19                               VII

20          The purpose of civil penalties is to promote compliance with the  
21          law. Penalties may be determined by previous violations, response of  
22          the alleged violator to conditions charged, and by the seriousness of  
23          the damage to persons or environment. We therefore conclude under all  
24          the facts and circumstances that the penalty is appropriate.

25  
26          FINAL FINDINGS OF FACT,  
27          CONCLUSIONS OF LAW AND ORDER  
                PCHB NOS. 91-162 & 91-168



VIII

Any Finding of Fact which is deemed a Conclusion of Law is hereby adopted as such.


From these Conclusions of Law, the Board enters the following

ORDER

Notice and Order of Civil Penalty No. 7444 is affirmed in full for \$1,000, with \$200.00 suspended, provided the appellants do not violate in the State of Washington, any air pollution laws or regulations for one year from the date of this order.

DONE this 19<sup>th</sup> day of December, 1991.

POLLUTION CONTROL HEARINGS BOARD

  
HAROLD S. ZIMMERMAN, Presiding

  
ANNETTE S. MCGEE, Member